STATE OF MICHIGAN

IN THE SUPREME COURT

J & J FARMER LEASING, INC., FARMER BROTHERS TRUCKING CO., INC., CALVIN ORANGE RICKARD, JR., and JAMES W. RILEY, as Personal Representative of the ESTATE OF SHARYN ANN RILEY, Deceased,	Supreme Court No. 125818 Court of Appeals No. 239069 Lower Court No. 96-3742-NO
Petitioners/Appellees,	
v.	
CITIZENS INSURANCE COMPANY OF AMERICA,	
Respondent/Appellant.	

BRIEF OF *AMICUS CURIAE* INSURANCE INSTITUTE OF MICHIGAN IN SUPPORT OF APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Amicus curiae Insurance Institute of Michigan accepts and relies on Statement of Relief Sought submitted by appellant Citizens Insurance Company of America ("appellant") for purposes of this brief.

STATEMENT OF ISSUES

1. What is the effect of the agreement at issue with respect to the tortfeasor's liability, if any, for the unsatisfied portion of the judgment?

Trial Court Answer: None.

Appellant's Answer: It eliminates pecuniary loss to the policyholder.

Amicus Answer of IIM: It eliminates pecuniary loss to the policyholder.

2. Under what circumstances can an assignment of a bad faith claim allow the assignee's suit against the insurer to proceed?

Trial Court Answer: Not directly answered.

Appellant's Answer: Where the policyholder has remaining liability for pecuniary loss.

Amicus Answer of IIM: Where the insurer first has potential liability, which should be non-existent where the insurer has relied on and participated in Case Evaluation under the Court Rules and has offered its limits of liability within the time for acceptance prescribed by MCR 2.403(L)(1).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae Insurance Institute of Michigan accepts and relies on Statement of Facts submitted by appellant for purposes of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE* AND GROUNDS SUPPORTING LEAVE TO APPEAL

The Insurance Institute of Michigan ("IIM") is a non-profit Michigan corporation formed to serve the Michigan insurance industry and insurance consumers as a source of information and education regarding insurance issues for the media, the government, and the public. Its mission includes creating a greater public awareness of the insurance business and the benefits to the Michigan economy of a private, entrepreneurial insurance and risk management industry through educational and public relations programs, safety and loss prevention activities, strong press and media assistance to consumer programs, legislative and lobbying efforts, judicial and legal overview, and other activities that will promote an improved understanding of the purpose and principles of insurance and assist the public in addressing their business and personal needs. It has 45 insurer members, and most write automobile no-fault policies.[1]

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[1] The members are: Allied Insurance Company, Allstate Insurance Company, American Fellowship Mutual Insurance Company, Auto Club Insurance Group, Badger Mutual Insurance Company, Cincinnati Insurance Companies, DaimlerCrysler Insurance Company, Elevators Mutual Insurance Company, EMC Insurance Companies, Farm Bureau Insurance Group, Farmers Insurance Group, Farmers & Merchants Mutual Fire Insurance Company, Farmers Mutual Fire Insurance Co., First Non-Profit Insurance Company, Foremost Insurance, Frankenmuth Mutual Insurance Company, Fremont Mutual Insurance Company, GEICO Corporation Group, GMAC Insurance Holdings Group, Grange Insurance Company of Michigan, Great Lales Casualty Insurance Company, Harleysville Lake States Insurance Company, Hastings Mutual Insurance Company, MEEMIC Insurance Company, Michigan Construction Industrial Mutual, Michigan Insurance Company, Michigan Millers Mutual Insurance Company, Mid-State Surety Corporation, Nationwide Insurance Company, North Pointe Insurance Company, Northern Mutual Insurance Company, Ohio Casualty Group, Pioneer State Mutual Insurance Company, Professionals Direct Insurance Company, Progressive Insurance Company, ProAssurance Insurance Company, Secura Insurance, Southern Michigan Insurance Company, Starr Insurance, State Auto Insurance companies, State Farm Insurance, Titan Insurance company, USAA Group, Westfield Companies and Wolverine Mutual Insurance Company.

IIM's interest is simply this: the public interest. Indeed, this state's jurisprudence has recognized that the insurance industry is "affected with a public interest." *Attorney General v Michigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961). By conforming the so-called bad faith cause of action with Court Rules for alternative dispute resolution, the two can more efficiently encourage settlements, which are in the public interest, and, discourage unnecessary trials. That is in the interest of all. Additionally, since any bad faith payments by an insurer are likely to be passed on to the rate-paying public, the matter bears scrutiny, not only for the best rule to encourage settlements and discourage litigation, but also to minimize unnecessary societal costs. This supports conforming this state's case law on "bad faith" with the court rules promoting the expeditious and efficient settlement of lawsuits.

ARGUMENT

THIS COURT SHOULD GRANT LEAVE TO REVERSE THE COURT OF APPEALS DECISION IN THIS CASE TO BRING THE BAD FAITH REFUSAL TO SETTLE CAUSE OF ACTION IN LINE WITH THE PURPOSE AND PROCEDURE OF MCR 2.403, WHICH ENCOURAGES AND SIMPLIFIES THE EXPEDIENT SETTLEMENT OF CASES TO AVOID TRIAL.

IIM will not repeat the brief of appellant, but, agrees with appellant's contention that the Court of Appeals decision in this case contravenes the rationale of *Frankenmuth Mutual Ins Co v Keeley (On Remand)*, 436 Mich 372; 461 NW2d 666 (1990) (subsequently referred to as *Keeley II*).

However, IIM offers the Court a different perspective, and urges the Court to accept leave to make a broader improvement in the jurisprudence by conforming the "bad faith" cause of action to modern court rules on alternative dispute resolution, the primary method of which is case evaluation, (formerly known as mediation). The Court of Appeals decision in this case is troubling for a reason of further-reaching significance to the everyone in the dispute resolution business, courts and insurers alike. The Court of Appeals decisions effectively undermine the purpose for MCR 2.403 by allowing an insured to sue its insurer for the insurer's alleged bad faith failure to settle where the insurer acted in reliance on the case evaluation court rules. By so doing, the ruling is undermining the purposes of the Rule, and, the jurisprudence would be better served by conforming the bad faith cause of action to the modern rules on case evaluation, specifically, with a rule that there should be no bad faith cause of action where an insurer has tendered the limits of liability within the 28 days for acceptance of case evaluation under MCR 2.403(L)(1).

The case evaluation rules encourage parties to settle their claims by simplifying the settlement procedure and making that procedure expedient, relatively simple, and efficient. These rules reflect the high value Michigan's courts have placed on allowing parties to resolve their own disputes to avoid the uncertainty inherent in proceeding to trial. Case evaluation should be the focal point for bad faith liability because the court rules merge the issues of liability and damages, and, insurance, in light of MCR 2.403(J)(1) ("Factual information having a bearing on damages or liability must be supported by documentary evidence, if possible"), and, MCR 2.403(J)(3): "Information on applicable insurance policy limits and settlement negotiations shall be disclosed at the request of the case evaluation panel." Thus, case evaluation of serious cases allows consideration of insurance in the context of settlement. And, the incentive to settle is bolstered by MCR 2.403(O), which provides that the party who rejected the case evaluation pay the prevailing party's costs – a fairer result than the one reached in this case, where the insured caused the case to proceed to trial but was released from liability by assigning its bad faith claim to the estate.

The decisions in this case reduce the value of case evaluation as a settlement tool and encourage trials. The decisions in this case allow parties – i.e., claimants or insureds – to make an early time expiring demand for settlement, long before discovery has been completed and long before the case has been evaluated in accordance with the Court Rules. In making this early demand, parties engage in gamesmanship, to try to ensure that they will be able to sue on any excess judgment from the insurer and thus are discouraged from settling in accordance with the true value or with case evaluation.

Moreover, under *Keeley II*, insurers enjoyed relative certainty regarding their potential liability in bad-faith suits because this Court's decision in *Keeley II* limited insurers' exposure for a judgment exceeding policy limits to the amount the claimant could have collected from the insured. In this case, however, the Court of Appeals took from insurers this "shield" and armed insureds with a double-edged "sword," allowing them to insist on rejection of a mediation award, take their chances with a jury, and then assign their bad faith claim to the claimant in exchange for being released from the suit.

These reasons and those raised by appellant in its Application demonstrate that this case implicates legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3). Thus, IIM recommends that this Court grant leave to reverse the Court of Appeals decision and conform "bad faith" jurisprudence to court rules on case evaluation procedures.

A. Standard of review.

Grants or denials of summary disposition are reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. The Court of Appeals penalizes insurers for relying on the case evaluation procedure set forth in the court rules.

Instead of repeating the arguments set forth in appellant's brief, IIM asks this Court to observe the effect of the two Court of Appeals decisions in this case, starting with *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, unpublished opinion per

curiam of the Court of Appeals, decided October 22, 1999 (Docket No. 209236).[2] There, the Court of Appeals allowed a bad faith claim to proceed, notwithstanding the fact that appellant offered to settle within policy limits *after the case had been evaluated pursuant to MCR 2.403*. This directly conflicts with the purpose of the court rules – to simplify the expedient settlement of cases to avoid trial. See, e.g., *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332; 486 NW2d 128 (1992).

Moreover, the *Farmer Leasing I* decision penalizes the insurer for complying with the court rules, allowing the claimant (or the insured) to demand settlement before discovery and *before the case has been evaluated pursuant to the court rules.* The penalty, of course, comes in the form of the insured effectively locking in its bad faith claim. The case at bar presents this Court's opportunity to bring bad faith claims in line with the goal of the case evaluation procedures established by court rules.

The purpose of case evaluation – or "mediation," as it was formerly called – is to promote the efficient, expedient resolution of cases, thus obviating the need for trial. See *Larson, supra*, 194 Mich App at 332. This is – or should be – the aim of any alternative dispute resolution procedure. Haight, *Michigan Mediation under MCR 2.403: ADR that Works*, 72 Mich BJ 1018, 1019 (1993). This commentator also noted that a second goal of MCR 2.403 is "to assist counsel and their clients to realistically evaluate their case." Haight, *supra*, at 1019. Thus, case evaluation is the court rule ordained point of settlement. This aim is served as well by the sanctions provisions found at MCR 2.403(O)(1). That subrule provides in relevant part, "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's

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[2] This decision is referred to as *Farmer Leasing I* on subsequent reference.

actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." Case law applying this sanction underscores this purpose as well.

In *Pinto v Buckeye Union Ins Co*, 193 Mich App 304, 310; 484 NW2d 9 (1992), the Court of Appeals noted the purpose of mediation sanctions: "to place the burden of litigation costs upon the party that insists upon a trial by rejecting a proposed mediation award." The Court held that the party responsible for rejecting the award should bear the expense of the resulting sanctions, reasoning that "the purpose of the rule can be furthered only by requiring the person or entity responsible for rejecting the mediation award to bear the costs of that rejection." *Id.* at 311. Thus, it stated, if the insurer was responsible for rejecting the award, the insurer should pay; if the insured rejected the award, the insured should pay. *Id.*

Mediation or case evaluation also reflects the longstanding favor that settlement has found with Michigan's courts. "Public and judicial policies favor settlement. By and large, settlement represents a tactical evaluation of the situation by both parties. . . . For both parties, settlement eliminates the doubt and possible harshness concomitant with an unfavorable verdict." *Watts v Michigan*, 394 Mich 350, 356; 231 NW2d 43 (1975) (quoting *Steele v Wilson*, 29 Mich App 388, 395; 185 NW2d 417 (1975)). This historic, deeply rooted policy is expressed in a wide range of cases[3] and, for example,

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[3] See, e.g., *Wehmeier v W. E. Wood Co*, 377 Mich 176, 183; 139 NW2d 733 (1966) (applying this policy in a workers compensation dispute); *Putney v Haskins*, 414 Mich 181, 189; 324 NW2d 729 (1982) (applying this policy in a dramshop action); *Ogden v George F. Alger Co*, 353 Mich 402, 406-407; 91 NW2d 288 (1958) (applying this policy in an employment contract dispute); *White v Grismore*, 333 Mich 568, 580; 53 NW2d 499 (1952) (applying this policy in a will contest); and *Flanders Co v Canners' Exchange Subscribers*, 235 Mich 157, 160-161; 209 NW2d 113 (1926) (applying this policy in an insurance contract dispute).

MRE 408, which bars the admission of evidence concerning settlements or offers to settle.

Applying *Pinto* to the case at bar reveals that the Court of Appeals undermined the goal of case evaluation in allowing the bad faith claim to proceed, despite the fact that the insurer (1) expressed its willingness to participate in the case evaluation process, and (2) engaged in settlement negotiations with the claimant following case evaluation and offered the limits of liability. Both Court of Appeals decisions in this matter put the insurance industry in what can be fairly termed a no-win situation. A closer look at the pertinent facts of this case further illustrates this point.

- *November 1994*: Sharyn Riley was killed when insureds' driver crossed the centerline and collided with Ms. Riley's vehicle. *Farmer Leasing I, supra*, at 5.
- *February 1995*: Insureds' counsel wrote to appellant, expressing her concern that the insureds' exposure could exceed the policy limit of $750,000; she also opined that a reasonable settlement would be between $500,000 and $750,000. *Id.*
- *March 1995*: The Riley estate offered to settle for $750,000. *Id.* at 4.
- *April 1995*: Insureds' counsel wrote appellant, requesting that appellant make a $750,000 offer of judgment. Appellant subsequently rejected this request. *Id.* at 5-6. Appellant's internal memorandum indicated that the estate's claim was worth $500,000, stating that *"it was appropriate to wait until mediation" to settle.* *Id.* at 6 (emphasis added). Thus, the insurer

offered the minimum opined by the insured's counsel, and, determined to utilize the court rule procedure for considering any higher amount.

- *June 1995*: Insureds' counsel filed a $500,000 offer of judgment; the estate counter-offered to settle for $1.5 million following the deposition of Ms. Riley's husband. *Id.* at 6-7.
- *January 1996*: Mediation resulted in a case evaluation of $950,000. *Id.* at 7.
- *February 1996*: Appellant authorized payment of $750,000 policy limit; it asked Farmer Brothers to contribute $200,000 so that the mediation award could be accepted. Farmer Brothers responded that a jury verdict would put it "out of business; its attorney instructed appellant to reject the mediation award, and appellant consequently rejected the award as instructed. Insureds' counsel filed a $750,000 offer of judgment. *Id.*
- *March 1996*: The estate counter-offered for $825,000, including interest and costs. *Id.*
- *April 1996*: Insureds' counsel countered with a $750,000 offer of judgment. *Id.*
- *May 1996*: Appellant's vice president of claims attended a settlement conference and proposed that appellant contribute an additional $25,000 and that the insured contribute an additional $25,000 while requesting that the estate reduce its demand by $25,000. No settlement resulted. *Id.* at 8.
- *June 1996*: A jury returned a $3 million verdict for the estate. *Id.*

Presented with these facts, the Court of Appeals determined that there was a material factual question regarding whether defendant acted in bad faith in failing to settle. *Id.* In so finding, it faulted the lower court for considering only that defendant had offered to settle for the policy limit after mediation. *Id.* The Court of Appeals also found error based on the lower court's failure to apply any of the twelve factors from *Commercial Union v Liberty Mutual*, 426 Mich 127, 136-137; 393 NW2d 161 (1986). *Id.* However, *Commercial Union* did not address the effect of modern court rules for case evaluation and the process there that allows evaluation in light of liability, damages, and, available insurance.

There should be no bad faith cause of action where an insurer has fully complied with the procedure set forth by MCR 2.403. After all, *Pinto* makes an insurer a participant for sanctions. It should be able to rely on the benefits of case evaluation, too. Appellant only waited to consider a higher settlement offer above the minimum of the range opined by defense counsel until after the case had been evaluated. At that point discovery on both sides had presumably been completed. MCR 2.403.

It cannot be overstressed that there is a need to conform bad faith jurisprudence to the court rules. This is underscored by the case evaluation rule which provides that information regarding "applicable insurance policy limits and settlement negotiations shall be disclosed at the request of the panel." MCR 2.403(J)(3). (Emphasis added). The focal point for bad faith now must be case evaluation. Presumably, appellant, like any other insurer in its position, wanted to benefit from the case evaluation panel's "flexibility to properly evaluate the nature, extent, and certainty of the plaintiff's claim and the likelihood of recovery." *Espinoza v Thomas*, 189 Mich App 110, 118; 472

NW2d 16 (1991). However, while appellant participated in discovery and case evaluation, its decision to do so was forming the basis of what would be its insured's claim alleging that appellant refused in bad faith to settle. IIM submits that it cannot, as a matter of law, be bad faith to follow the court rules for case evaluation.

However, the Court of Appeals decision in *Farmer Leasing I* renders the case evaluation procedures one-sided against insurers because they cannot afford to wait for these procedures to take place. Instead, insurers have to entertain early – indeed, premature – settlement demands (whether from claimants or insureds), knowing that if they refuse those demands and opt, instead, to follow the court rules, they risk paying an excess judgment even if they have tendered the limits during the period for acceptance of case evaluation. But how can it be bad faith for a party to insist on its rights in a lawful manner?

C. Insurers cannot act in bad faith when they comply with and rely on MCR 2.403, and the rule's sanction provisions create sufficient incentive for insurers not to decline settlement in "bad faith."

IIM submits that the bad faith cause of action should conform to the case evaluation court rules. Their natural focus is encouraging settlement at that point. See *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002) (stating that the mediation sanctions provision in MCR 2.403 are "intended to foster settlement" and are not intended as a "punitive measure"). The best way to do this is to adopt a bright-line rule, contrary to the *Farmer Leasing I* holding, that where an insurer conforms its conduct to the court rules governing case evaluation by offering the policy limits within

the time for accepting case evaluation, its conduct does not give rise to a cause of action for bad faith refusal to settle.[4]

This, of course, would not give insurers free reign to refuse wrongfully or in bad faith to settle. The mediation sanctions provisions found at MCR 2.403(O) would serve as an additional incentive to reach a settlement after the case has been evaluated. See *Espinoza, supra*, 252 Mich App at 498. Other Court Rules provide sanctions, including for frivolous defenses. MCR 2.114(F). Moreover, case law construing MCR 2.403(O) makes clear that the party responsible for rejecting case evaluation should bear the cost. *Pinto, supra*, 193 Mich App 310-311. This is counter to the result in this case, where appellant is the only party potentially responsible for the excess judgment even though it was the insured who refused to settle for the case evaluation amount.

D. The Court of Appeals' deviation from *Keeley II* encourages claimants and insured parties to take their chances with a jury with unnecessary trials.

It is important to note that "bad faith" case law originated before modern court rules for alternative dispute resolution. See *City of Wakefield v Globe Indemnity Co*, 246 Mich 645, 648; 225 NW 643 (1929) (an insurer is liable to its insured where it refuses in bad faith to settle a claim within its policy limit). However, by ignoring the role of case evaluation in present cases, the goal of case evaluation to encourage settlements is thwarted. Claimants can rest on early gamesmanship by making time demands for policy limits before discovery is completed, because they do not have to

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[4] If this Court chooses to follow IIM's suggestion and create a bright-line rule of this kind, the answer to question of an assignment's effect in a bad faith claim is less important.

negotiate following case evaluation if they think they have a vested cause of action for bad faith. In *Commercial Union, supra*, 426 Mich 136-137, this Court defined what constitutes "bad faith," but notably without reference to ADR rules:

> Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent.

Further, this Court in *Commercial Union* further enumerated multiple factors that a court may apply in determining whether an insurer acted in bad faith. *Id.* at 137. Thus, this cause of action is based on judicial definition. Those factors, however, give no consideration to modern court rules for case evaluation, the focal point for settlement, but rather a disjointed array:

> 1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,
>
> 2) failure to inform the insured of all settlement offers that do not fall within the policy limits,
>
> 3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,
>
> 4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,
>
> 5) rejection of a reasonable offer of settlement within the policy limits,
>
> 6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high,
>
> 7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits,

> 8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,
> 9) disregarding the advice or recommendations of an adjuster or attorney,
> 10) serious and recurrent negligence by the insurer,
> 11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful, and
> 12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended. [*Id.* at 138-139 (internal citations omitted).]

It is pointedly anomalous that the jurisprudence is operating under a list of 12 factors, and not one of them considers the effect of Court Rule procedures for settlements. As a practical matter, conforming the bad faith cause of action to the court rules would render these bad faith factors largely obsolete, and rightly so. In fact, the procedure would be much simpler.

Both sides would have time for full and fair discovery. If a claimant truly has a meritorious claim for recovery in excess of policy limits, and the policyholder is collectable and hence really self-insured for the excess, claimants would not be rushed into an unfairly low settlement by premature gamesmanship through a ploy to set up an insurer for bad faith by a policy limits demand with a short time limit for acceptance, only to have the bluff called with an acceptance of the offer that deprives claimants of rightful recovery.

It should be kept in mind that the theory of the bad faith cause of action is that there was sufficient certainty of recovery that the policyholder was damaged by the insurer not taking advantage of the claimant's weakness in proffering a demand that was below the true value of the claim. The entire theory of the cause of action is thus premised on unclean hands on both sides. Parties should not be encouraged to make

precipitous demands that deprive rightful claimants of recovery for collectable and hence self-insured amounts above policy limits. Likewise, insurers should not be rushed into unfair early settlement negotiations, framed by a time demand for policy limits before discovery is completed, and faced with the dilemma of paying more due to the uncertainty, given the reality that it is being set up for exposure and litigation for bad faith.

The Court Rules for case evaluation eliminate the unfairness on both sides by providing for orderly discovery and then settlement evaluation by an outside panel of experienced attorneys. If everyone knows that the insurer's offer of limits following case evaluation eliminates bad faith, unnecessary trials will be eliminated because the claimant and the policyholder will know that they must get down to business; either there are or there are not collectable assets above insurance that the claimant is certain to recover. If there are not, the claimant should not force a trial based on the lottery thought that it can hit the insurer with a bad faith case. If there are collectable assets, then the policyholder should not join in the gamble by forcing a trial with a backup plan of assigning a bad faith cause of action and releasing its collectable assets.

In *Keeley II*, *supra*, 436 Mich at 376, this Court adopted Justice Levin's dissent from *Frankenmuth Mutual Ins Co v Keeley*, 433 Mich 525, 447 NW2d 691 (1989).[5] In so doing, this Court definitively established what damages are available to plaintiffs who established that their insurers refused in bad faith to settle within policy limits. In his

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[5] This case is referred to as *Keeley I* in this brief and in other cases following this Court's decision in *Keeley II*.

dissenting opinion, Justice Levin proposed that the more sound rule would limit plaintiffs to damages that would have actually been collectable from the insured. *Id.* at 565.

Justice Levin reasoned that before the majority opinion in *Keeley I*, Michigan consistently applied contract principles in determining the damages available to plaintiffs from their insurers. *Id.* at 556-557. Contract remedies, he noted, "encourage promisees to rely on promises . . . by securing the 'expectation interest' through awarding damages for the economic loss suffered by the promisee." *Id.* at 557-558 (citing Calamari & Perillo, Contracts (3d ed), § 14-4, p 591; 3 Restatement Contracts, 2d, § 347, p 112). Moreover, Justice Levin reasoned that the majority opinion in *Keeley I* blurred the line between tort and contract remedies. See *Id.* at 559-560. In its concern that insurers be prevented from receiving a "windfall,"[6] Justice Levin wrote, the majority "for the first time departed from the principle of confining the damages for breach of contract by an insurer to the economic loss suffered by the promisee." *Id.* at 559-560.

While this Court's decision in *Keeley II* allowed contract principles to prevail in bad faith claims against insurers, the concern that insurers would receive a windfall arose again in the Court of Appeals decision in the case at bar. *J & J Farmer Leasing, Inc v Citizens Ins Co of America*, 260 Mich App 607, 623; 680 NW2d 423 (2004). The Court of Appeals noted appellant's argument that because the insured parties were released from the lawsuit, they were no longer able to show any pecuniary harm – i.e., the release relieved the insured parties of their obligation to pay beyond the policy limit.

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[6] As Justice Levin pointed out, worries that insurers would receive a windfall were ill founded because "[c]ontract damages are generally measured by the loss to the promisee, not the loss or gain to some other person." *Keeley I, supra*, 436 Mich at 559.

Id. The Court acknowledged that appellant's argument was "arguably correct"; however, it did not adopt the argument because of its concern that appellant would use the "shield" created for insurers in *Keeley II* as a "sword to escape any payment on an excess judgment, despite the insured's ability to pay some or all of it, merely because the insured assigned the bad faith claim to the judgment holder and in exchange obtained relief from paying the underlying judgment." *Id.* The Court stated that to adopt appellant's argument would:

> evade the intent of our Supreme Court [in *Keeley II*] and cause a windfall for the insurer on the basis of the insured's savvy in saving itself from potential financial ruin, which saving action needed to be done only as a result of the insurer's alleged bad faith in causing an excess judgment against its insured. [*Id.* at 623-624.]

This language from the Court of Appeals decision highlights another one of the problems that now concerns IIM: It allows damages that are apparently unrelated to the *insured*'s pecuniary damages arising from the insurance contract.[7]

But why should any party get a windfall based on anachronistic sword and shield logic? The focal point for modern bad faith law should be whether the insurer tendered limits during the period for accepting case evaluation. This uncertainty can be avoided by making MCR 2.403 the primary procedure for settling cases because, as previously noted, the party responsible for rejecting the case evaluation is charged with paying the prevailing party's costs pursuant to MCR 2.403(O). See *Pinto, supra*, 193 Mich App 310-311.

By allowing a bad faith claim to proceed without regard to an insurer's reliance on case evaluation under the court rules and without regard to the insured's pecuniary loss,

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[7] This major flaw in the Court of Appeals decision is briefed fully by appellant.

the insured has every incentive to take its chances with a jury. Stated another way, it has nothing to lose. For example, here, the insured was unwilling to contribute even $25,000 toward an offer of judgment to settle the case. *Farmer Leasing I, supra*, at 8. The only explanation for why there was a trial is that after Citizens offered limits following case evaluation, the claimant and the policyholder were convinced that the groundwork for what would be its bad faith claim against appellant was already in place. The claimant did not have to accept limits; the policyholder did not have to contribute to any settlement above limits. Their shared parachute was the possibility of assigning the bad faith cause of action in a way that would relieve the policyholder of any liability. The matter proceeded to trial, where a jury returned a $3 million verdict. And the Court of Appeals decision in this case makes appellant potentially liable for the judgment exceeding the policy limits that it already paid.

The two decisions from the Court of Appeals in this case thwart the purpose and desired result of case evaluation rules. Trials are encouraged. The claimant can rest on an early time demand. The insured party in a situation like the one in this case has everything to gain from directing its insurer-appointed attorney[8] to reject case evaluation where it has collectable assets. With these decisions in place, an insured party can rest assured that it can extricate itself from responsibility for any part of the collectable excess case evaluation by assigning its bad faith claim to the claimant after judgment with a release of its liability for the excess judgment.

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[8]"[T]he defense attorney's primary duty of loyalty lies with the insured, and not the insurer." *Atlanta International Ins Co v Bell,* 438 Mich 512, 520; 475 NW2d 294 (1991).

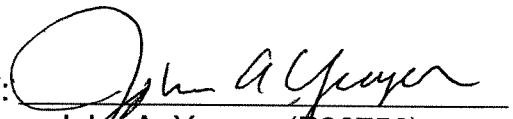
CONCLUSION AND RELIEF REQUESTED

Based on the above, IIM respectfully requests that this Court grant appellant's leave to appeal in this matter to conform bad faith jurisprudence to the court rules on case evaluation, or in the alternative, peremptorily reverse the Court of Appeals' decision.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Dated: February 14, 2005

BY: 

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